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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a criminal defendant found not guilty by reason in insanity of attempted petit larceny—a misdemeanor—can, consistent with due process, be confined indefinitely to a mental hospital on the basis of that finding alone.

2. Whether a criminal defendant found not guilty by reason of insanity is denied equal protection of the laws by confinement in a mental hospital, without the benefit of procedural protections available to civil commitees, for longer than he could have been incarcerated upon conviction.

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JURISDICTION

The judgment of the court of appeals sitting *en banc* was entered on May 29, 1981, and the petition for a writ of certiorari was filed on August 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

24 D.C. Code §301(d) and 21 D.C. Code § 545(b):

These provisions are set forth in footnotes 1 and 2 of the *en banc* opinion of the court of appeals, which was reproduced in Appendix A of the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioner was arrested on September 19, 1975, and arraigned the following day in the Superior Court of the District of Columbia on a charge of attempted petit larceny for trying to steal a coat from a Washington, D.C. department store. Under District of Columbia law, the offense was a misdemeanor, carrying a maximum jail sentence of one year. 22 D.C. Code § § 103, 2202. On September 22, he was ordered to St. Elizabeths Hospital, a public mental hospital, for a mental examination. After a three and one-half month delay, during which Mr. Jones was confined to the District of Columbia Detention Center pending availability of space at the hospital, he was transferred to St. Elizabeths, where he remained for about one month. On March 12, 1976, Mr. Jones appeared in court for trial. Dr. David Shapiro, a clinical psychologist from the hospital, testified that Mr. Jones was competent for trial but that, on the date of the offense, he was suffering from a mental disease that substantialy impaired his behavior controls and that the offense was the product of this mental disease. In an uncontested proceeding before a judge of the Superior Court, petitioner was then found not guilty by reason of insanity of attempted petit larceny. Pursuant to the automatic commitment provision of 24 D.C. Code § 301(d)(1), petitioner was recommitted to St. Elizabeths Hospital for further evaluation, and a hearing was scheduled under that sub-section to afford petitioner an opportunity to demonstrate his eligibility for release.

After a series of continuances, that hearing went forward on May 25, 1976. Dr. Gertrude B. Cooper, another clinical psychologist from the hospital, testified concerning petitioner's condition. She related that the Occupational Therapy Section at the hospital had informally offered an evaluation:

> They found that Mr. Jones is quiet, that he responds to other people both patients and staff. He does not initiate contact. That he tends to be by himself. That he carries out projects in an acceptable fashion.

(Tr. 5/25/76, at 7).[1] Dr. Cooper added, however, that he did not consistently accept others' advice. Once, for example, he disregarded a staff suggestion that he apply lacquer to a copperwork project that he had fashioned, and this "caused the therapy assistant some anxiety." *Id.* Nonetheless, according to Dr. Cooper:

> He does want to recover. He does ask for suggestions as to what he might do and we feel he is positively motivated.

Id.

He sometimes experienced hallucinations and was receiving medication, *id.* at 8, but, she said:

> Well, pretty much all of us have agreed that he is very self-[effacing] individual [sic] and no one really gets to know him very well. He does not create any problems. He doesn't get into any difficulty but he also does not lead to active [sic] social life. He is not a very active participant in the informal activities on the Ward. The patients play cards, play pool, do things like that. He keeps to himself more.

Id. at 8-9. She concluded, also, that he would pose a danger if released.[2]

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[1]This transcript, which was not included in the record before the court of appeals, has been lodged with the Clerk of this Court.

[2]On cross-examination, Dr. Cooper explained (Tr. 5/25/76 at 10-11):

> Q. . . . Is he a danger to the community? I think that is what we are most interested in.
>
> A. Yes, I think so. I think if indeed his attempted assault was—was the product of his illness. He is still likely to do the same thing again; the attempted larceny. *(continued)*

On the strength of this testimony, the trial court concluded that Mr. Jones had not sustained the burden that the statute placed upon him, and it ordered him recommitted to the hospital.

At a later hearing held pursuant to the petitioner's request, through new counsel, for release under 24 D.C. Code § 301(k), the petitioner argued that the due process clause of the Fifth Amendment, and the equal protection principle implicit in it, required his release unless he was afforded a new commitment hearing with the protections available to prospective civil commitees since he had already been confined longer than would have been possible had he been convicted, rather than acquitted by reason of insanity. After a further hearing held on February 22, 1977, the Superior Court denied his request, and petitioner appealed to the District of Columbia Court of Appeals.

Mr. Jones argued to the court of appeals that his confinement was unconstitutional. A three-judge panel, in an opinion reported at 396 A.2d 183 (1978), initially ruled against his claim, but the panel granted petitioner's request for rehearing. In a second opinion reported at 411 A.2d 624 (1980), the panel, by a two-to-one vote, sustained his contention that his continued forcible hospitalization denied him rights secured under the Fifth Amendment due process clause unelss he was afforded a hearing that was substantially equivalent to a civil commitment proceeding. The government.

(footnote continued from preceding page)

Q. Attempted assault or was it attempted larceny?

A. I believe it was larceny.

Q. You don't know?

A. Well, I was not involved in his trial. I'm simply saying based on what I recall of the record, he is likely to repeat the same activity either way.

then successfully petitioned the court of appeals for rehearing *en banc*, and the court, sitting *en banc*, again reversed itself. With three judges dissenting, it held that the petitioner's commitment could constitutionally continue indefinitely subject only to his right to secure his release by affirmatively demonstrating by a preponderance of the evidence that he was not mentally ill or dangerous. On January 11, 1982, this Court granted certiorari.

SUMMARY OF THE ARGUMENT

Petitioner's continuing confinement, despite the fact that his mental illness and dangerousness have never been demonstrated by clear and convincing evidence as required in civil commitment proceedings by this Court's decision in *Addington v. Texas*, 441 U.S. 418 (1979), is a denial of due process of law. The predicate for petitioner's indefinite commitment has never been established with the constitutionally required degree of certainty. Moreover, petitioner's trial, which resulted in a verdict of not guilty by reason of insanity of attempted petit larceny, cannot substitute for a hearing that conforms with *Addington*. The issues at petitioner's trial were substantially different from the issues at the hearing that culminated in his indefinite commitment to a mental hospital, and, at all events, mental illness was established only under a lower standard of proof. Nor can the finding of insanity at that trial create a "presumption" that can validly excuse the failure to afford petitioner a hearing that complies with *Addington*. Saying that a presumption of insanity emanated from petitioner's criminal trial, so that otherwise necessary procedural protections could be dispensed with, merely

argues with different language the point just discussed. A presumption of this sort also conflicts with the teachings of *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979), and *Ulster County Court v. Allen*, 442 U.S. 140, 167 (1979), that a mandatory presumption (which the presumption here would be), even if rebuttable, is invalid if it undermines a constitutionally required burden of persuasion.

To the extent that the provisions for commitment of persons found not guilty by insanity in the District of Columbia may legitimately serve a purpose that is not implicated in civil commitment proceedings, that purpose was fully served by the time that petitioner had served a year in the hospital. For by then he had been confined as long as he could have been had he been convicted. In 1970, Congress made it more difficult for a defendant to win an acquittal by reason of insanity, and it made it more difficult for a defendant who nonetheless prevailed to avoid commitment to a mental hospital afterwards. Congress' purpose was to reduce the likelihood that a person who had committed a criminal act could avoid confinement by taking advantage of the gap that separated the burden of proof by which the government, before 1970, had to demonstrate a defendant's sanity once the defense was properly raised, and the burden by which, if the government failed, it then had to show that the insanity acquitee should be committed. Congress' principal worry was that a person who was not truly insane could nonetheless raise a reasonable doubt as to his sanity and thereby avoid conviction. The government was, Congress feared, then unlikely to be able to prove affirmatively that such a person should be committed. Consequently, he would escape all confinement, although he should have been sentenced to a term in prison.

Such a danger has been altogether avoided in petitioner's

case, because he has already been confined for longer than the one year he could have served if his insanity defense had failed. Consequently, no reason remains to deny him the protection *Addington* requires.

Analogous reasoning leads to the conclusion that, on equal protection grounds, petitioner is entitled to the safeguards provided in civil commitment proceedings in the District of Columbia, including the right to trial by jury. After his completion of a year's confinement in the hospital, no distinction remained that could justify treating petitioner differently from a civil commitee. Application of the principles developed in such cases as *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Jackson v. Indiana*, 406 U.S. 715 (1972), to this case leads to the conclusion that petitioner must be released unless a present basis for commitment can be established in proceedings that conform in all substantial respects with ordinary civil commitment proceedings.

ARGUMENT

I.

PETITIONER'S CONTINUED CONFINEMENT, WHICH HAS NOW EXTENDED LONG BEYOND THE PERIOD HE COULD HAVE BEEN CONFINED UPON CONVICTION, IS A DENIAL OF DUE PROCESS, FOR THE GOVERNMENT HAS NEVER ESTABLISHED THE PREDICATE FOR THAT CONFINEMENT—PETITIONER'S MENTAL ILLNESS AND RESULTING DANGEROUSNESS—BY THE CONSTITUTIONALLY REQUIRED STANDARD OF CLEAR AND CONVINCING EVIDENCE.

A. *Due Process Requires That The Need For An Indeterminate Involuntary Commitment Be Demonstrated By Clear And Convincing Evidence.*

In *Addington v. Texas*, 441 U.S. 418 (1979), this Court unanimously held that, before an individual could be committed indefinitely to a mental institution, the basis for the commitment must be established by clear and convincing evidence. It held, therefore, that a Texas commitment scheme, which permitted the indeterminate confinement of persons deemed mentally ill and dangerous, could be constitutionally implemented only if the putative commitee's illness and dangerousness were proved under this standard. The Court in *Addington* recognized that the government's interest in confining a person whose mental illness makes him dangerous to himself or others is a weighty one, and that an erroneous decision not to commit such a person not only deprives him of potentially beneficial treatment, but may also jeopardize the public safety. Nevertheless, the Court concluded, the state must prove the need for commitment by clear and convincing evidence because the individual's liberty interest is of such "weight and gravity" that "the individual should not be asked to share equally with society the risk of error." *Id.* at 427. The Court declined to require proof of committability beyond a reasonable doubt because it thought the existence of mental illness was not an issue susceptible to such an exacting standard of proof, and because the risk of an erroneous commitment was tempered by the existence of procedures to review the continuing need for a patient's commitment.

These same considerations apply with equal force where, as here, the government seeks an *indefinite* commitment to a mental hospital following a finding of not guilty by reason of

insanity.[3] To the extent that Congress' purposes in providing for the commitment of persons found not guilty by reason of insanity are the same as for civil commitees—to provide for the confinement and treatment of mentally ill and dangerous persons—then the analysis of *Addington* applies per force here.[4] And the result should be the same: to satisfy due process standards, the government must demonstrate by clear and convincing evidence that the insanity acquitee is mentally ill and dangerous to himself or others as a result of that illness.

But Congress has asserted another interest here, the validity of which is not at issue in this case. As the legislative history of the present sections 301(d), (e) and (j) makes clear, Congress established the standards that presently control insanity trials, commitment hearings, and release proceedings to curb what it perceived as abuses of the insanity defense. It clearly sought to minimize the possibility that criminal defendants would escape confinement in either a prison or a hospital despite their blameworthiness or dangerousness. The House report conveys this purpose in no uncertain terms:

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[3]We emphasize the word "*indefinite*" here to highlight that the issue raised by this case is an exceedingly narrow one. The issue is not the legality of petitioner's automatic commitment under 24 D.C. Code §301(d) following his acquittal by reason of insanity. That initial confinement need not, for purposes of petitioner's argument, be viewed as an indefinite one subject to *Addington* standards. But once the commitment extended beyond the maximum one year term which could have been imposed upon petitioner's conviction, it became an indefinite commitment, the need for which must be demonstrated by clear and convincing evidence.

[4]That this was clearly one of Congress' purposes in providing for an automatic commitment following an insanity acquittal is evident from the fact that it provided for the release of insanity acquitees who are not mentally ill and dangerous. *See* 24 D.C. Code §301(e).

> [D]angerous criminals, particularly psychopaths, [are able] to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity and then to escape hospital commitment because the government is unable to prove their insanity following acquittal by a preponderance of the evidence. The result is a revolving door which . . . allows defendants "to have it both ways" . . . The Committee considers this result intolerable.[5]

To this end, the legislature closed the gap that had previously separated the applicable burden of proof at the trial and at subsequent release proceedings. In so doing, Congress sought to place upon the defendant the risk of erroneous resolution of the issue whether he should be released, once it has been proved beyond a reasonable doubt that he committed a criminal act. In section 301(d), it placed the burden on the insanity acquitee to demonstrate by a preponderance of the evidence his eligibility for release, while previously the burden had fallen upon the government to show that the acquitee should be committed. *Bolton v. Harris*, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968).[6] Simultaneously, in section 301(j), Congress required the defendant at his criminal trial to prove his insanity by a preponderance of the evidence, while before 1970 the government was required to

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[5]H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 74 (1970).

[6]Congress in 1955 provided for the automatic commitment of insanity acquitees. *See Bolton v. Harris, supra*, 130 U.S. App. D.C. at 6-7, 395 F.2d at 648-49. In *Lynch v. Overholser*, 369 U.S. 705 (1962), this Court construed the automatic commitment provision as not applying to the insanity acquitee who did not himself raise the defense, and in *Bolton*, the court of appeals held that principles of equal protection required reading the pre-1970 and post-1955 section 301(d) as requiring a pre-commitment hearing substantially similar to the hearing required in civil commitment proceedings.

prove sanity beyond reasonable doubt. *Davis v. United States*, 160 U.S. 469 (1895). These two means were aimed at the common goal of eliminating any possibility that a defendant who committed the charged offense would erroneously avoid confinement, whether in jail or in a hospital. Together, they reallocated from society to the defendant the risk of error on the question of the defendant's release or confinement.[7] Whether principles of due process or equal protection permit the assignment of these risks to the defendant in order to minimize the risk of an erroneous decision to release need not be answered in this case. Here, Congress' legitimate interest in reallocating the risks of error is fully vindicated because the insanity acquitee has already served as long a period in therapeutic confinement in a mental hospital as he could have served in prison.[8] Consequently, at this point, the validity of his continuing confinement must be proved by the standards required in *Addington*.

Petitioner does not challenge Congress' power to require an insanity acquitee, rather than society, to bear the risk of erroneous commitment during the period which the acquitee could have been incarcerated upon a finding that he was

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[7]By adjusting the burdens as it did, Congress, of course, substantially increased the risk of an erroneous decision to confine (or to confine in prison a defendant who should have been confined in a hospital).

[8]The petitioner here has already been confined far longer than he could have been confined upon conviction, even if the maximum sentence had been imposed. Consequently this case does not raise the issue of how long the defendant acquitted by reason of insanity of an offense carrying a very long maximum sentence could be confined without proof of committability. The United States Court of Appeals for the District of Columbia Circuit has spoken to this issue in several panel opinions. *Compare United States v. Brown*, 155 U.S. App. D.C. 402, 408, 478 F.2d 606, 612, (1973) *with United States v. Ecker*, 177 U.S. App. D.C. 31, 52, 543 F.2d 178, 199 (1976), *cert. denied*, 429 U.S. 1063 (1977).

responsible for his acts; for while the commitment and release hearing at which the acquitee must prove that he is not mentally ill or dangerous may well result in an erroneous determination of committability,[9] he may also have been erroneously acquitted by reason of insanity. Through one means or another—imprisonment after conviction or confinement after acquittal by reason of insanity—the public is entitled to a measure of protection from someone who has been shown to have committed a criminal act. But even if these interests provided a constitutional basis for the initial commitment, that commitment cannot "constitutionally continue after that basis no longer exist[s]." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Where, as here, the

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[9]The possibility of error here is a very real one. This Court recognized in *Addington* that commitment proceedings necessarily involve complex and inherently fallible psychiatric diagnoses as well as inherently uncertain predictions about future conduct. 441 U.S. at 429. Thus, even leaving aside the issue of the *standard* of proof, a substantial risk of error is borne by whichever party carries the *burden* of proof. *See Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). As the District of Columbia Circuit put it, "in cases concerning psychiatric testimony, which is 'often unclear, sometimes woefully muddled" the allocation of the burden of proof can be outcome determinative." *Waite v. Jacobs*, 154 U.S. App. D.C. 281, 284, 475 F.2d 392, 395 (1973) (quoting *United States v. Leazer*, 148 U.S. App. D.C. 356, 358, 460 F.2d 864, 866 (1972). Indeed, this Court has held that even a prisoner serving a term of imprisonment has a liberty interest sufficient to entitle him to a hearing at which the government must prove present mental illness before involuntary transfer to a mental hospital. *Vitek v. Jones*, 445 U.S. 480 (1980). Petitioner's own case demonstrates vividly the importance of the burden of proof. When the panel of the District of Columbia Court of Appeals reversed itself and ordered that the government either proceed with civil commitment proceedings or release the petitioner, the government apparently felt that it would be unable to prove that petitioner was committable when it declined to initiate civil commitment proceedings after the court of appeals' second panel decision. By the same token, the petitioner has been unable to prove that he should be released.

acquitee has already been confined longer than he could have been incarcerated upon conviction—in this case almost seven times longer—the public has obtained even greater protection against the acquitee's potential dangerousness than it would have had if his insanity defense had failed. Thus, after one year, the risk of error for an erroneous indeterminate commitment must be borne by the government. For after that time has passed, the balance of individual and social interests at stake is precisely the same as it was in *Addington*, and the risk of error must be allocated accordingly. As this Court put it in *Addington*, "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." 441 U.S. at 427. In petitioner's case, society has not been victimized by the revolving door that Congress was worried about when it amended 24 D.C. Code § 301. Instead, petitioner has been the hapless victim of a door that has been wedged shut. If the government wishes to continue his confinement, it must now prove the need for it.

B. *Petitioner's Criminal Trial, At Which He Was Acquitted By Reason Of Insanity, Cannot Substitute For a Commitment Hearing Which Would Justify An Indefinite Commitment.*

Petitioner has argued that before he can be committed indefinitely to a mental hospital the government must prove the need for such a commitment by clear and convincing evidence. The government's response to this argument seems to be that the petitioner's criminal trial, at which he was acquitted by reason of insanity, is functionally equivalent to, or can somehow substitute for, a hearing at which the government proves the need for an indefinite commitment.

But the issue of criminal responsibility at trial was significantly different in several crucial respects from the issue of whether he can be committed indefinitely as mentally ill and dangerous. Thus the petitioner's trial was not a constitutionally adequate hearing to justify an indefinite commitment.

To begin with, petitioner's trial cannot substitute for a constitutionally adequate hearing because petitioner proved mental illness at trial by a mere preponderance of the evidence, the lowest burden of proof known to our law, while in *Addington* this Court mandated a substantially higher standard. The one cannot substitute for the other. Moreover, a mental illness that sufficed to excuse petitioner from blame for trying to steal a coat on one particular occasion could well be too insubstantial for commitment to be appropriate, even if it had been established beyond all doubt that petitioner was suffering from that illness. As the District of Columbia Court of Appeals has itself acknowledged in other cases, the fact-finder's determination of the issue of the defendant's insanity at a criminal trial is ultimately not a medical conclusion, but "a social or moral judgment" about whether "a man should . . . or should not be held accountable" for his alleged crime. *Bethea v. United States*, 365 A.2d 64, 76 (D.C. 1976); *see also United States v. Freeman*, 357 F.2d 606, 619-20 (2d Cir. 1966). The ultimate question at trial is blameworthiness. Where, as here, the offense charged is itself among the less reprehensible acts that are punishable as crimes, the fact-finder will be more likely to excuse the actor on account of an illness than if, as a result of the same illness, the defendant had committed a violent crime. Similarly, because the fact-finder in a civil commitment proceeding must satisfy itself that the illness is sufficiently grave as to justify involuntary, indeterminate confinement, a mental illness that serves to excuse an attempted petit larceny could well be deemed insufficiently serious as to warrant that commitment.

Finally, the issue at trial was not, of course, the defendant's mental condition at the time of trial, but his condition at the time of the offense. The defendant's claim that he should not be held accountable for trying to steal the coat was in no way an assertion about his mental condition at the time he presented his defense.[10] To prevail on an insanity defense, the defendant's illness need not linger past the day of the offense. In contrast, the issue in commitment proceedings is present illiness, and a decision to commit reflects a prediction that the illness will persist.

Thus the criminal trial, even one at which the defendant must prove his past mental illness as an affirmative defense, does not establish present mental illness by clear and convincing evidence, the predicate which *Addington* requires for an indeterminate commitment.

The petitioner's trial also failed to establish the requisite showing of dangerousness, for proof of a single act of attempted petit larceny is by no means equivalent to proof that the accused "is likely to injure himself or other persons" as is required for civil commitment under 21 D.C. Code §545(b). The issue is not, as the court of appeals erroneously conceived it, whether proclivity to theft, a non-violent crime, is as a categorical matter inadequate to satisfy the danger element of the commitment standard. Petitioner is not arguing that future danger to others' property is necessarily insufficient. But to begin with, one effort to steal a coat, standing alone, in no way proves that the unsuccessful thief, even if insane, is likely to repeat his conduct in the future. Indeed, the available evidence fails to establish that those acquitted by reason of insanity are more dangerous or likely to repeat

[10]Indeed, petitioner was considered well enough by the time of trial to participate competently in the proceedings against him.

criminal conduct than those that are convicted. *See* Burt, *Of Mad Dogs and Scientists: The Perils of the "Criminal-Insane,"* 123 U. Pa. L. Rev. 258, 262 (1974), and sources cited therein. At all events, a rational decision whether to commit or not is impossible unless the fact-finder considers both the gravity of the threatened harm as well as the likelihood that the harm will come about. Because minor property offenses are surely on the lower end of the spectrum of threatened harms, a comparatively high likelihood of repetition would have to be shown to justify commitment. Proof—even beyond a reasonable doubt—that at one particular time and place petitioner tried to steal a coat from a store cannot by itself answer this far more difficult question. Indeed, in *Addington* itself, the petitioner did not contest the fact of past assaultive conduct. All that Addington "attempted to show was that there was no substantial basis for concluding that he was probably dangerous to himself or others." 441 U.S. at 421. Despite the uncontested issues, this Court ruled that the state has to prove probable dangerousness by clear and convincing evidence.

Commission of one offense, therefore, simply does not demonstrate future dangerousness, although the offense would certainly be relevant to the latter determination, and, at least where violent conduct was involved, would doubtless go a long way toward convincing the fact-finder that the government had met its burden of proving committability. *See Specht v. Patterson*, 386 U.S. 605, 608-10 (1967). But even if proof of a single criminal act did show dangerousness, the government cannot compensate for deficiencies in its proof of one element of its case with the fact that it has proved even more than it had to with respect to another element. Just as every element of a criminal offense must be proved beyond a reasonsable doubt, *In re Winship*, 397 U.S. 358 (1970), so

each of the prerequisites for an indeterminate commitment must be proved by clear and convincing evidence. Thus, the fact that the government proved beyond a reasonable doubt that the petitioner attempted to steal a coat cannot, even if this established dangerousness, justify an indeterminate commitment without proof of mental illness by clear and convincing evidence.[11]

C. *The Government Cannot Rely On Presumptions Of Continuing Insanity And Dangerousness Arising From Petitioner's Acquittal By Reason Of Insanity To Justify Abbreviated Commitment Proceedings.*

Both the court of appeals in its *en banc* opinion, and the government in its opposition to the petition for certiorari, argue that a presumption of continuing insanity or dangerousness justifies the "abbreviated" commitment proceedings that were held in this case. This argument is but an indirect way of saying that the findings at the criminal trial itself can in some substantial measure substitute for constitutionally required commitment proceedings. Draping this argument in the verbal garb of "presumptions" cannot cloak its constitu-

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[11]The government, in its opposition to the petition for certiorari, mistakenly asserts that there was affirmative proof of a sort, in the form of a letter from St. Elizabeths Hospital to the court. The letter in fact had no independent evidentiary significance at petitioner's hearing under section 301(d). And though it may have proved something about the witness' competence, no one could contend, without blushing, that the testimony adduced at that hearing, which consisted solely of the testimony of a psychologist from St. Elizabeths Hospital, proved anything whatever about the petitioner, except that he prefers his copperwork unvarnished. *See supra* p. 3. At all events, there never has been a judicial finding by clear and convincing evidence that petitioner is mentally ill and dangerous.

tional infirmities. As petitioner has argued, his trial was a constitutionally inadequate prelude to an indeterminate involuntary commitment simply because proof that he once tried to steal a coat does not establish present dangerousness by clear and convincing evidence, and because proof of past mental illness by a preponderance of the evidence does not establish present mental illness by clear and convincing evidence. The presumptions which the goernment cobbles up here cannot be made to do the work of constitutionally required factual proof. It would be as though in a criminal trial the jury was instructed that it should "infer" that the government had proved an element of the offense beyond a reasonable doubt from the fact that it had proved it by a preponderance of the evidence.

This Court has addressed the issue of when a presumption violates due process in several recent decisions. The presumption here—of the mandatory, rebuttable sort—is analogous to the presumptions held unconstitutional in *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975), and *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). In those cases, mandatory rebuttable presumptions that applied at criminal trials were struck down on the ground that they compromised the reasonable doubt standard by shifting the burden of persuasion on an element of the offense. So, too, here, the presumption relied on by the court of appeals relieved the government of its constitutionally mandated burden to prove petitioner's committability by clear and convincing evidence.

In *Ulster County Court v. Allen*, 442 U.S. 140 (1979), this Court said that a mandatory, rebuttable presumption could survive due process scrutiny in a criminal case only if "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *Id.* at 167. Here, as we have

argued, the facts established at petitioner's trial cannot support a "clear and convincing" inference that he was both mentally ill and likely to injure himself or others at the time of his section 301(d) hearing, when he had an opportunity to rebut the presumption. *See supra* at pp. 13-17. The lower court simply applied the wrong standard when it concluded that "the continuation of these attributes [mental illness and dangerousness] is a rational and permissible evidentiary presumption," 432 A.2d at 374, for rationality is the test for a permissive, rather than a mandatory, presumption. *See Ulster County Court v. Allen*, *supra*, 442 U.S. at 157.[12]

II.

PETITIONER'S CONTINUED COMMITMENT IN THE ABSENCE OF THE PROTECTIONS AFFORDED IN CIVIL COMMITMENT PROCEEDINGS VIOLATES HIS RIGHT TO EQUAL PROTECTION OF THE LAWS.

Petitioner's indefinite commitment to St. Elizabeths Hospital, for longer than the maximum prison term he could

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[12]The presumption here fails even the rationality test. Proof that petitioner attempted to steal a coat because of a mental illness, without more, cannot permit one to predict "with substantial assurance" that it was more likely that not that, at the time of petitioner's section 301(d) hearing, he would injure himself or others if released. *See Leary v. United States*, 395 U.S. 6, 36 (1969). Thus even on the court of appeals' own analysis, the constitutionality of confining petitioner indefinitely to St. Elizabeths Hospital cannot be salvaged by resort to the language of presumptions.

have served upon conviction, denies him equal protection of the laws.[13] This confinement, which is "a massive curtailment of [petitioner's] liberty," *Humphrey v. Cady*, 405 U.S. 504, 509 (1972), purportedly rests on the same substantive basis as a civil commitment,[14] yet petitioner has never been afforded important procedural protections that are extended as a matter of right to civil commitees. This disparity in treatment, whether justified or not at the initial commitment stage, bears no rational relationship to a legitimate state goal once an acquitee has been confined in the hospital for as long as he could have served in jail had he been found criminally responsible for his acts.

A. *There Are Important Procedural Differences In The Treatment Of Acquitees and Commitees.*

The acquitee is treated more harshly than the commitee in several respects. First, the commitee, but not the acquitee, may demand a jury trial on the issue of his committability. *Compare* 21 D.C. Code §544 *with* 24 D.C. Code §301(d).

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[13]The right to equal protection is implicit in the due process clause of the Fifth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam); *Weinberger v. Wiesenfield*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

[14]Section 21-545(b) of the District of Columbia Code establishes a two-prong test for civil commitment: whether a "person is mentally ill and, because of that illness, is likely to injure himself or other persons." Section 24-301(d) mentions only entitlement to release, without defining any standard, but the court of appeals construed section 301(d) as embodying the identical substantive standard as its civil counterpart. 432 A.2d at 372 & n.16. Moreover, 24 D.C. Code §301(e) clearly implies that mental illness and dangerousness are the substantive standards for the commitment of insanity acquitees.

Though the court of appeals dismissed the absence of a jury trial right as "an insubstantial difference,"[15] this Court in *Humphrey v. Cady* confirmed the importance of the jury's role in the commitment determination:

> [T]he jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.

405 U.S. at 509.

In addition, the acquitee has been committed without proof of committability by clear and convincing evidence as is required in a civil commitment hearing. *In re Nelson*, 408 A.2d 1233, 1236 (D.C. 1979). Indeed, unlike the civil commitee, the acquitee himself bears the burden of proving that he is not mentally ill or dangerous. 24 D.C. Code §301(d)(2)(B). This difference may well determine whether the person is committed. *See supra* p. 12 & n.9.

Finally, the acquitee faces far more onerous procedures to obtain release from confinement than are imposed on the commitee. When the superintendent of St. Elizabeths Hospital certifies that a commitee is cured, the individual must be discharged. 21 D.C. Code §548. In contrast, even when the superintendent certifies that an acquitee has recovered, the statute requires a hearing if either the government or the trial

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[15]432 A.2d at 374. The court reached this conclusion by reading *Addington v. Texas* as defining the issue in a commitment proceeding to be dependent upon the expert testimony of psychiatrists and psychologists. *Id.* The court, however, failed to note that *Addington* makes no reference to jury trials; in that case the emphasis on the need for expert testimony went solely to the issue of the standard of proof. Thus, the conclusion of the court of appeals that the jury trial is not "as meaningful" is in no way compelled or even suggested by *Addington*.

judge wants one. And after the hearing, the court may prohibit release even if the medical testomony unanimously supports it.[16]

B. *There Is No Rational Basis For Imposing Upon Petitioner Different Procedural Requirements From Those Imposed Upon Civil Commitees.*

District of Columbia law, then, withholds from the insanity acquitee important procedural protections afforded the putative civil commitee. Numerous commentators[17] and courts[18] have suggested that because involuntary commitment involves deprivation of the fundamental right to liberty, such differences are invalid unless they survive strict judicial scrutiny.

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[16]24 D.C. Code § 301(e); *see United States v. Ecker*, 177 U.S. App. D.C. 31, 34-35, 543 F.2d 178, 181-82 (1976) (trial court judge denied release despite recommendation of hospital psychiatrists), *cert. denied*, 429 U.S. 1063 (1977).

[17]*See, e.g.*, German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted By Reason of Insanity*, 29 Rutgers L. Rev. 1011,1012 n.4 (1976); Kirschner, *Constitutional Standards for Release of the Civilly Committed and Not Guilty By Reason of Insanity: A Strict Scrutiny Analysis*, 20 Ariz. L. Rev. 233, 266 (1978); Note, *Commitment Following Acquittal By Reason of Insanity and the Equal Protection of the Laws*, 116 U. Pa. L. Rev. 924, 933 (1968).

[18]*See, e.g., Benham v. Edwards*, 501 F. Supp. 1050, 1054 n.1 (N.D. Ga. 1980); *Reynolds v. Neill*, 381 F. Supp. 1374, 1384 (N.D. Tex.) (three judge court), *vacated sub nom. Sheldon v. Reynolds*, 422 U.S. 1050 (1974), *reinstated*, 404 F. Supp. 1004 (N.D. Tex. 1975); *People v. Feagley*, 14 Cal. 3d 338, 356, 535 P.2d 373, 384, 121 Cal. Rptr. 509, 520 (1975). In petitioner's view, this is the analysis that should be applied if this Court determines that the classification at issue here satisfies the minimal rationality test.

Nevertheless, strict scrutiny analysis is unnecessary in the present case. For after an acquitee has remained confined for as long as the maximum term to which he could have been sentenced, the District of Columbia scheme lacks even a rational basis;[19] the classification here does not "rationally further[] some legitimate, articulated state purpose." *Maher v. Roe*, 432 U.S. 464, 470 (1977) (quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973)).

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[19]Several state supreme courts, relying primarily upon the decisions of this Court in *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Jackson v. Indiana*, 406 U.S. 715 (1972), have invalidated disparate treatment of acquitees and commitees. Most of these courts have found that principles of equal protection require identical treatment of the two classes; a few have found that some disparity in treatment is constitutional. *See, e.g., State v. Clemons*, 110 Ariz. 79, 82-84, 515 P.2d 324, 327-29 (1973) (en banc) (equal protection clause prohibits disparate treatment of acquitees and commitees in either commitment or release proceedings); *In re Franklin*, 7 Cal. 3d 126, 140, 496 P.2d 465, 473, 101 Cal. Rptr. 553, 561 (1972) (en banc) (equal protection requires that acquitees be afforded same right to jury trial as other commitees); *Mills v. State*, 256 A2d 752, 757 (Del. 1969) (equal protection clause prohibits depriving acquitees of procedural protections afforded in civil release proceedings); *Wilson v. State*, 259 Ind. 375, 385-86, 287 N.E.2d 875, 881 (1972) (equal protection clause requires that acquitee be afforded same procedural protections as civil commitee in both commitment and release proceedings); *People v. McQuillan*, 392 Mich. 511, 540, 543, 221 N.W.2d 569, 582, 584 (1974) (equal protection clause requires that acquitees be afforded same procedural protections available in civil release proceedings); *State v. Krol*, 68 N.J. 236,253-55, 344 A.2d 289, 298-99 (1975) (equal protection clause requires that acquitees be afforded same procedural protections as civil commitees); *People v. Lally*, 19 N.Y.2d 27, 35, 224 N.E.2d 87, 92, 277 N.Y.S.2d 654, 660 (1966) (*Baxstom* requires that acquitee be afforded all procedural protections available in civil commitment proceedings); *State ex rel. Walker v. Jenkins*, 157 W. Va. 683, 690, 203 S.E.2d 353, 358 (1974) (equal protection clause requires that acquitee be afforded all procedural rights available to civil commitees); *State ex rel. Kovach v. Schubert*, 64 Wis. 2d 612, 622, 219 N.W.2d 341, 364 (1974) (equal protection clause requires that acquitee be afforded equivalent of civil commitment hearing), *appeal dismissed*, 419 U.S. 1117, *cert. denied*, 419 U.S. 1130 (1975).

(1) *The Trial Court's Finding That Petitioner Committed A Criminal Act Because of Mental Illness Does Not Provide A Rational Basis To Support The Continuing Disparate Treatment.*

For both the civil commitee and the insanity acquitee, the substantive standard for commitment is the same: present mental illness and dangerousness. As described above, however, the procedures for making this determination differ in significant ways. The court of appeals reasoned that petitioner's insanity acquittal, standing alone, is sufficient to relieve the government from the burden it must carry in civil commitment proceedings—to demonstrate *present* mental illness and dangerousness to a *jury* by *clear and convincing* evidence.[20]

[20]In fact, if the insanity acquitee is subject to an indeterminate commitment without the protections that petitioner now seeks, the acquitee is at the moment of his acquittal already disadvantaged in comparison with the hospital patient who has been committed only after the full course of civil commitment proceedings. For the acquitee is immediately confined for an indefinite period of hospitalization that will last unless and until he can affirmatively demonstrate his entitlement to release to a judge in proceedings under section 301(d), (e), or (k). The civil commitee may secure his release more easily, for the hospital itself may order the commitee's confinement to end. 21 D.C. Code §548. The 301(d) hearing—which differs from hearings under section 301(e) or (k) only in that it is automatically held within 50 days of the acquittal—is thus an even less effective safeguard than the *release* proceedings afforded civil commitees. One relevant comparison for equal protection purposes is, therefore, between petitioner's criminal trial, on the one hand, and the hearing afforded respondents in civil commitment proceedings, on the other. Although petitioner has followed the court of appeals in framing his equal protection analysis in terms of a comparison between insanity acquitees, who are subject to proceedings under section 23-301(d), and

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But the trial verdict alone cannot substitute for the finding of present mental illness and dangerousness that must be made before an indeterminate civil commitment. *See Baxstrom v. Herold*, 383 U.S. 107, 114-15 (1966).[21] As petitioner has argued, the factual predicate for his commitment has *never* been directly and affirmatively proved. In this case, proof that petitioner committed a criminal offense—trying to steal a coat—while mentally ill, simply cannot substitute for the affirmative proof of present mental illness and dangerousness required in civil commitment proceedings. *See supra* pp. 13-17.[22]

(footnote continued from preceding page)

potential civil commitees, who are treated under section 21-545, an alternative analysis based upon this other comparison will lead to the same result—that petitioner could not constitutionally be confined for longer than one year without hearings substantially equivalent to those held pursuant to section 21-545.

[21]In that case, the state contended that persons in Baxstrom's class could rationally be distinguished from civil commitees because they were "not only insane but [had] proven criminal tendencies as shown by their past criminal records." This Court responded:

> We find this contention untenable. Where the State has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Corrections, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term.

383 U.S. at 115 (footnote omitted). Likewise, here, the fact that petitioner has been found guilty of a crime is not a rational basis for depriving him of the statutory procedures for determining the dangerousness of putative civil commitees.

[22]This case, then, demonstrates the irrationality of a statutory scheme that treats all acquittals by reason of insanity—whatever the offense—as proving existing mental illness and dangerousness. For it is simply irrational to consider attempted petit larceny as equivalent to rape or murder in demonstrating dangerousness.

(2) *The Government's Interest In Preventing Dangerous Persons From Escaping Both Conviction And Commitment Does Not Provide A Rational Basis For The Disparate Treatment Of Acquitees And Commitees Once The Acquitee Has Been Confined As Long As He Could Have Been Upon Conviction.*

When Congress established the legislative scheme at issue here it sought to minimize the possibility that dangerous criminals would escape both imprisonment and commitment; it feared that within the class of insanity acquitees were some persons who had escaped imprisonment through erroneous acquittals. *See supra* pp. 9-11.[23] If there was a legitimate purpose to be served by distinguishing petitioner from civil commitees at the *outset* of his commitment, it may have been this desire to minimize erroneous avoidance of confinement.[24] But this purpose for differentiating petitioner from commitees on account of his insanity acquittal was fully attained once he

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[23]Congress hoped to reduce the number of persons who had undeservedly avoided confinement both by discouraging false insanity pleas and by confining those who nonetheless prevailed on such a plea. *See Lynch v. Overholser*, 396 U.S. 705, 715 (1962).

[24]Some commentators strongly dispute the rationality of using this policy to justify additional burdens for acquitees. They suggest that this method of discouraging false insanity pleas will actually discourage "legitimate pleas of insanity by those who do not wish to trade a determinate jail sentence for the uncertainties of hospitalization." German & Singer, *supra* note 17, at 1021; *see* Note, *supra* note 17, at 937. Moreover, these commentators argue that this approach may actually function to encourage false insanity pleas:

> Frequently, the insanity defense is the result of a plea bargain. Where prosecutors and judges know that a defendant will be incarcerated even if not convicted, they are more likely to tolerate, or even encourage, an insanity acquittal, thereby saving themselves both the time involved in a full trial, and the risk of that defendant's release if he is not convicted.

German & Singer, *supra*, at 1021.

had been confined for as long as he could have been if convicted and sentenced. Since the legislature in 22 D.C. Code § § 103, 2202 determined that confinement for at most one year was sufficient to protect the public against the harm of the offense of attempted petit larceny, the risk of erroneous avoidance of confinement was eliminated once petitioner had been confined for that year. Further confinement without the procedural protections afforded commitees achieved no legitimate purpose different from that supporting the confinement of commitees, and became merely an arbitrary penalty upon his right to plead not guilty by reason of insanity.

This Court's decisions in *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Humphrey v. Cady*, 405 U.S. 504 (1972), as well as in *Jackson v. Indiana*, 406 U.S. 715 (1972), all support this point. In differing contexts, these cases all suggest or expressly hold that a person's status as a criminal defendant, whether as a person who has been convicted of a crime and served his sentence (*Baxstrom*), as one who has been convicted and confined to a special term of therapeutic treatment in lieu of sentence (*Humphrey*), or as one who has been accused of a crime and found incompetent (*Jackson*), cannot excuse the failure to provide the ordinary protections extended in civil commitment proceedings before a person is committed to an indefinite term in a mental hospital. Each case in this line holds, on equal protection grounds, that upon the satisfaction of the purpose that initially justified the person's confinement, a continuation or renewal of the commitment can be accomplished only through the ordinary civil commitment process.[25] This point was reached in petitioner's case after he had served one year in the hospital.

[25] *See O'Conner v. Donaldson*, 422 U.S. 563 (1975), where this Court recognized that even when an involuntary confinement was "founded upon a constitutionally adequate basis . . . it [can] not constitutionally continue after that basis no longer exist[s]." *Id.* at 574-75; *see also McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972).

The United States Court of Appeals for the District of Columbia Circuit, in *United States v. Brown*, 155 U.S. App. D.C. 402, 478 F.2d 606 (1973), analyzed these cases and arrived at substantially the conclusion that petitioner now urges. That court concluded that *Baxstrom* teaches that after a person has served his prison term, "whatever additional protection is [then] needed because of present danger from mental illness must be sought from ex-convicts on the same basis as from non-convicts who are dangerous by reason of mental illness." *Id.* at 408, 478 F.2d at 612. Applying this conclusion to the insanity acquitee, the *Brown* court said:

> The clear implications of the foregoing analysis, and *Baxstrom* require . . . that when the individual has been in detention for a considerable period of time, his continued detention *vel non* sould be governed by the same standard of proof as applies to civil commitments.[26]

Id.; *see United States v. Ecker*, 177 U.S. App. D.C. 31, 52, 543 F.2d 178, 199 (1976) (release proceedings must be the same after maximum sentence), *cert. denied*, 429 U.S. 1063 (1977); *Waite v. Jacobs*, 154 U.S. App. D.C. 281, 287, 475 F.2d 392, 398 (1973).[27]

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[26]The "considerable period of time" to which the *Brown* court referred could, the court explained, "never exceed the maximum sentence for the offense." 155 U.S. App. D.C. at 408, 478 F.2d at 612. The question whether Brown was entitled to a hearing by jury was not in issue, for he had had such a hearing. *Id.* at 403, 478 F.2d at 607.

[27]The government, in its opposition to the petition for certiorari, suggested that these court of appeals decisions are inapposite to the present case. The argument appears to rest on the fact that the defendants in *Brown* and *Waite* were tried both before the 1970 amendments to the District of Columbia insanity law and the court of appeals' decision in *Bolton v. Harris*, 130 U.S. App. D.C. 1, 395 F.2d 642 (1968). Thus, the argument goes, the position of these defendants can be distinguished

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Petitioner's case presents a particularly close analogy to *Jackson v. Indiana*, *supra*. In *Jackson*, an Indiana statute provided that a criminal defendant could be committed to a mental hospital before his trial if he was incompetent to participate in the proceedings. As long as he remained incompetent, he could, under the statute, remain hospitalized, even if there was no hope of future recovery. Justice Blackmun, wirting for a unanimous Court, reasoned that once it is determined that the defendant is unlikely to recover his competency in the foreseeable future, "then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant." 406 U.S. at 738. Once it had been determined that further care and treatment would not render him competent, the purpose of pretrial confinement had been fulfilled. Thus no rational basis remained for distinguishing this incompetent defendant from any other person facing possible commitment.[28]

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from that of petitioner because they never had the opportunity to have their sanity/dangerousness determined at a section 301(d) hearing. This distinction, however, is illusory. All that section 301(d) does is provide an automatic hearing—one at which the patient bears the burden of proving he is no longer mentally ill or dangerous—that is identical to the habeas corpus review to which Waite, for example, was entitled. Indeed, the very proceeding that culminated in the *Waite* decision was an appeal from the district court's denial of Waite's habeas petition. Thus, when the court of appeals decided *Waite*, he had in fact been afforded at least one hearing precisely like that which petitioner obtained under section 301(d). It is therefore clear that the alleged "distinction" is nonexistent.

[28]Recently, the First Circuit held that, under *Jackson*, the outer limit of detention for an incompetent defendant, even where it is uncertain whether his competency can be restored within the foreseeable future, is the maximum sentence possible under the crime with which he is charged. *United States v. DeBellis*, 649 F.2d 1, 3 (1st Cir. 1981).

The parallel to the present case is clear. Petitioner here need not challenge his initial commitment and detention under procedures substantially more burdensome than those afforded civil commitees. For even assuming the validity of that commitment, once his commitment on those terms persisted longer than the maximum prison sentence imposable after conviction, the rationality of the distinction disappeared.[29] Congress sought to avoid the risk that a dangerous person would escape an appropriate term of confinement. In petitioner's case, the statute that it enacted for this purpose has long since accomplished its goal. There is, therefore, no longer any reason to deny him the protections routinely provided in civil commitment proceedings. As every day passes, petitioner is denied equal protection of the laws.

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[29]This conclusion is supported by the Court's decision in *Humphrey v. Cady*, 405 U.S. 504 (1972). In *Humphrey*, the defendant was convicted of contributing to the delinquency of a minor, a misdemeanor carrying a one-year maximum sentence. Instead of imprisonment, however, he was committed to a "sex deviate facility"—an alternative confinement authorized by state statute for an initial term equal to the maximum prison sentence. The statute also permitted five-year renewals of commitment, imposable after a hearing that lacked many of the procedural protections available in civil commitment hearings. In a federal habeas petition, the defendant argued that such renewal commitments in the absence of the procedural protections available to civil commitees (including right to jury trial), violated the equal protection clause. This Court unanimously reversed the district court's dismissal of the habeas claim, and remanded for an evidentiary hearing. In so doing, the Court rejected the state's argument that the defendant's criminal conviction alone is sufficient ground for denying the procedural protections available in civil commitment proceedings. *Id.* at 510-11. The Court reasoned that the "renewal orders bear substantial resemblance to the post-sentence commitment that was at issue in *Baxstrom*," *id.* at 511, and therefore suggested that once the maximum sentence period has expired, the initial criminal conviction by itself cannot justify further commitment.

CONCLUSION

Petitioner's due process and equal protection arguments are separate roads that lead to a similar result. Because petitioner has already been confined in the hospital for a far longer term than he could have served had he never raised the insanity defense or had that defense failed, the remedy under either theory is clear. Because he has been denied due process of law, petitioner should either be released from his commitment, or be afforded a hearing that complies with the standards set forth in *Addington*. Moreover, because he has been denied equal protection of the laws, petitioner is similarly entitled to release, or to a hearing equivalent to that provided putative civil commitees in the District of Columbia.

Because petitioner has already been confined beyond the maximum prison sentence that could have been imposed, this case does not present the question of the kind of hearing that should be held immediately upon acquittal by reason of insanity, or upon the acquitee's return from a 50-day observation period at the hospital. Nonetheless, it appears to petitioner that more than one approach could be followed. If the government were not seeking a period of commitment that would last longer than the maximum sentence imposable upon conviction, or longer than such other appropriate measure of the sentence that the acquitee would have served but for the success of his insanity defense,[30] then present procedures would suffice. A hearing could be held at which the defendant would be required to demonstrate his eligibility for release. On the other hand, if the government at that point were seeking to initiate an indefinite commitment, it would be

[30] *See* n. 8 *supra*.

required to prove mental illness and resulting dangerousness to a jury by clear and convincing evidence. Alternatively, the government could postpone decision until shortly before the expiration of the maximum prison term, and then either seek indefinite commitment at a civil hearing, or permit the acquitee to be released.

For the foregoing reasons, the judgment of the District of Columbia Court of Appeals should be reversed.

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